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Soft on Defense:

The Failure To Confront Militarism

Ann Scales†

War provokes at least one certain reaction from the legal academy: symposia. There have been scores of conferences and law review issues devoted to the aftermath of the events of September 11, 2001. The topics range across national security law generally (the prosecution of the “war on terror” specifically) and the effects of this regime on constitutional governance (such as the Patriot Act, the status of detainments at Guantanamo Bay, and the torture of...
prisoners). To my knowledge, however, this is only one of two symposia since September 11 about "women and war." Why is that? I believe it is important to inquire because almost nothing in United States law makes sense—and the ways law works on women surely don’t make sense. We must first clock the nature of militarism.

As the reader is aware, a lot has happened in military affairs between the date of the Boalt conference—March 12, 2004—and the date of publication of this expanded version of the talk I gave at that conference. I could go on forever tracing the daily developments in the burgeoning life of militarism. I have decided, however, to cut off my research as of election day, November 2, 2004. A lot will have happened between then and publication, to be sure; but I am fairly confident that the logic I describe in this article will hold true past that date.

Off the top, I want to distinguish between “the military” and “militarism,” the latter being the subject of this article. The military, as I understand it, is the means organized by the government to protect its people from external threats of violence. In the social contract theories that underlie the American republic, we the people give up our individual self-governance in very limited circumstances. The legitimacy of government depends upon those limitations being perpetually scrutinized, reinforced, and redrawn as circumstances dictate. The limitations are particularly crucial in the military context, because in that context the government asks some of the people—soliders and their loved ones—to make profound sacrifices. The grant of the power to the government to create and command military force is the most sacred of trusts.

These days, it is customary to preface any public statement by an outpouring of support for our men and women in uniform. I am not a “yellow-ribbon” person, but I am a patriot, at least in the sense of admiring the American experiment and happily sustaining the obligations of citizenship. I believe it is necessary for the United States to have some sort of military force. I believe military life is hard even in times of “peace.” People in the military deserve meaningful compensation and family support while in service, and comprehensive health care and re-integration services for post-military lives. To talk sensibly about military matters, I think we need to acknowledge that reasons for joining the armed forces are immensely varied, and that the results of membership differ dramatically for individuals. I fervently hope that as soon as possible, the United States will revisit the notion of informed consent as it applies to military service. We also need to have frank discussion—very difficult since the defeat of the United States in Vietnam—about whether to

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2. The other is Gender and War, 9 DUKE J. GENDER L. & POL’Y 195 (2002).
3. Peace is a difficult concept. It cannot mean simply the absence of large-scale armed conflict at a given moment. For the moment, I would suggest that peace is the opposite, the total inversion, of everything I discuss in this article as the “logic of war.” These differences are described in JONATHAN SCHELL, THE UNCONQUERABLE WORLD: POWER, NONVIOLENCE, AND THE WILL OF THE PEOPLE (2003).
reinstitute the draft (or some other form of compulsory national service) as a matter of fairness, and whether to expand conscientious objector status in the ways the rest of the world has.

These are tough questions, as central to the meanings of "security," "future," and "citizenship" as any I can imagine. Fortunately, for purposes of this symposium, I am not required to answer them. Again, I am not presently talking about "the military," but about "militarism." In 1989 I defined "militarism" as:

the pervasive cluster of forces that keeps history insane: hierarchy, conformity, waste, false glory, force as the resolution of all issues, death as the meaning of life, and a claim to the necessity of all that.

Slightly less abstractly, today I would define militarism as the manifestation at every level of policy—military and otherwise—of the logic of war. In the classic logic, for war to be a useful part of politics, it cannot be half-hearted. Every policy, including every domestic policy, must be measured by its effect on military capability and readiness, lest some rival gain any small advantage. Cost is no object. Disproportionality is part of the expectedly exorbitant price. If

4. Congress abolished the draft in 1973. At the moment, United States military forces are stretched quite thin. See Vernon Loeb and Steve Vogel, Reserve Tours Are Extended; Army Orders 1-Year Stay in Iraq, Nearby Nations, WASH. POST, Sept. 9, 2003, at A1. There is some movement afoot to reinstate the draft. Robert Pear, U.S. Has Contingency Plans for a Draft of Medical Workers, N.Y. TIMES, Oct. 19, 2004, at A22. In the 2004 presidential contest, both sides disavowed the draft, and it would be unquestionably unpopular. See Williams A. Kamens, Selective Disservice: The Indefensible Discrimination of Draft Registration, 52 AM. U. L. REV. 703, 752 (2003) (stating that, "Since 1981, no presidential administration has ever seriously considered a draft"). It remains to be seen how the military will cope with the personnel crisis. See ELIOT A. COHEN, CITIZENS AND SOLDIERS: THE DILEMMAS OF MILITARY SERVICE (1985) (discussing the options available to the military in this crisis).

5. In the United States, exemption from military service (including discharge of active service people) is granted by Congress, and requires that the citizen essentially show that he has religious objections to war. See U.S. v. Seeger, 380 U.S. 163, 176 (1965) (interpreting a statute to apply to those who have a religious objection to war and those whose objection is based upon a God-like authority in one's life). Many other countries, however, provide a constitutional right of conscience – religious and otherwise – that will exempt a person from military service. Some of these constitutions provide exemption from all (including non-military) service to the government. See José de Sousa e Brito, Political Minorities and the Right to Tolerance: The Development of a Right to Conscientious Objection in Constitutional Law, 1999 BYU L. REV. 607, 611-12 (1999) (noting provisions in constitutions of Portugal, Germany, Austria, Holland, Croatia, Slovenia, Estonia, Slovakia, the Czech Republic, Russia, Malta, Brazil, Uruguay, Guyana, Suriname and Zambia).


7. There is no better example of the excesses of the militaristic mentality than the recent case of Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). Mr. Hamdi is an American citizen who was captured in Afghanistan, allegedly fighting for the Taliban. Id. at 2635. The U.S. kept him in jail for three years without charging him with any crime and without providing for his constitutional rights, other than a recent begrudging opportunity to confer with counsel. Id. at 2636. The Bush administration claimed that to do otherwise would threaten national security in a number of ways. Id. at 2637. By an 8-1 margin, the Supreme Court disagreed, ordering
militarism is working its magic, all of this is largely invisible; it is treasonous to notice it, much less question it.

There is a possible comparison with the other hot potato issue of the day. In the controversy about same-sex marriage and the proposed Federal Marriage Amendment,\(^8\) we often hear that the legal institution of marriage brings with it “more than 1,138 automatic federal and additional state protections, benefits and responsibilities designed to support and protect family life.”\(^9\) This is a good argument about the unfairness of providing these automatic benefits to some couples but not others. It is also a powerful rhetorical device, because it evokes the elephant in the kitchen, the enormous legal accommodation of the institution of marriage. Without saying so explicitly, this argument suggests that, if we felt like it, we could scrutinize each and every one of these 1,138 benefits to see whether each is actually a good idea or justified by its social cost. It is scary to the status quo even to acknowledge all that “special treatment.”

I am tempted to generate a similar list of instances of special treatment for the military and military contractors. I suspect that we would find, similar to marriage, that there is one big underlying good reason to privilege all things military, but that the reason may not hold up regarding every particular instance of special treatment. National security does not require that the Halliburton Corporation get lucrative contracts without bidding on them.\(^10\) In any case, it would be extraordinarily time-consuming to analyze the entire United States Code,\(^11\) much less all the state codes that, for example, provide veterans’

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8. Sen. Wayne Allard (R-CO) and Rep. Marilyn Musgrave (R-CO) introduced the legislation to amend the Constitution of the United States, which reads in full:

   Marriage in the United States shall consist only of the union of a man and a woman.

   Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon unmarried couples or groups.


9. This number is given, and links to explanations of those benefits are provided. See Lambda Legal, Why Marriage Equality Matters, (May 10, 2004) at http://www.lambdalegal.org/cgi-bin/owa/documents/record?record=873.


11. According to a Westlaw search, as of November 1, 2004, the word “military” appears 6,825 times in the United States Code.
preferences of various kinds. More modestly, my goal is to look to some courses typical of law school curriculums, and identify how the assumptions of militarism are built into them.

MILITARISM IN THE LAW SCHOOL CURRICULUM
THE OBVIOUS CONTEXT: CONSTITUTIONAL LAW

The military questions most familiar to non-military lawyers arise from separation of powers among the federal branches. The President is the Commander-in-Chief, the executive power is vested in the president, and in any case, as a matter of structural imperative, the president needs to be the front man, the first responder, in foreign affairs. On the other hand, the Congress possesses the power to declare war and the power to raise and support armies. The question usually is, who has responsibility to do what in times of war? It arises in the context of the President's having taken or proposing to take unilateral military action. Must the Congress authorize such actions? If they must, how and when must they do so? Must Congress vote on an actual “declaration of war” against a specific national sovereign?

The debate about war powers is an inexhaustible source of constitutional scholarship. In recent discourse—at least since the Korean “police action”—the liberals are generally the strict constructionists, arguing in one form or another that it is unconstitutional for the Executive to take military action—or, after responding to an emergency, to maintain military action—without a Congressional declaration of war. Political conservatives are more likely to be

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12. States are free to grant veterans a wide range of benefits, even though to do so disproportionately and overwhelmingly disadvantages women. See Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 280 (1979) (upholding veterans' preference for civil service employment).


14. The United States Constitution enumerates several of Congress's military powers: to provide for the common defense; to punish offenses against the Law of Nations; to declare war; to raise and regulate armed forces; and to make all laws "necessary and proper" to the exercise of its enumerated powers. U.S. CONST. art. I, §8, cl. 1; U.S. CONST. art. I, §8, cl. 10; U.S. CONST. art. I, §8, cl. 11; U.S. CONST. art. I, §8, cl. 12-14; U.S. CONST. art. I, §8, cl. 18.

in the pro-Executive power camp, arguing for a broad interpretation of constitutional terms.

War tends to enhance the power of the executive branch, whether presidential, parliamentary, or monarchical. Legal interpretations that make it easier for the Executive to go to war make it easier for the Executive to accumulate power. It is not surprising, therefore, that among the dueling constitutionalists described above, those from the pro-Executive interpretive camp are more likely to turn up in powerful non-elected policy making positions. For example, Berkeley Law Professor John Yoo, author of a spate of recent articles urging the legitimacy of broad Executive power over military matters, was also the Justice Department official who infamously wrote that the United States was not bound by the Geneva Conventions in the treatment of prisoners taken during the Afghanistan and Iraq invasions.

In my lifetime, the accumulation of Executive power in military matters seems like a juggernaut. Congress has not actually declared war since World War II, and has not vigorously acted to limit Executive power in the absence of a declaration of war. Instead, Congress tends to provide “authorizations” to use force in various situations, as Congress did before the invasion of Iraq.17 We can usefully visualize these authorizations as delegations (constitutional or not) to the Executive of the Legislative power to declare war.18 It seems to be a perfect political avoidance strategy. Everybody gets cover, the President’s power is enhanced, and the defense contractors back in (some) Congressional districts get fat, new contracts.

When military matters come before courts, from the internment of Japanese Americans in World War II19 to the present day, courts will not intervene. Usually, this is in the form of application of the “political question”
According to this doctrine, matters are not susceptible to judicial review if they satisfy a test devised by the Supreme Court in *Baker v. Carr* in 1962. The factors set forth for consideration under that test speak largely to the need to respect the political branches of government and the comparative expertise of those branches on matters involving the military and/or foreign affairs. For example, after the Ohio National Guard killed four students at Kent State University during an anti-Vietnam War rally in 1970, students brought an action challenging both the training and the command of the Guard. In declining to hear the matter, the Supreme Court stated:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches.

Every lower federal court that considered the legality of the Vietnam war held in favor of the government for one reason or another. The Supreme Court had over a dozen opportunities to jump in, but declined to do so. Subsequently, courts have refused to intervene in several military deployments, and they refused again to intervene regarding the 2003 invasion of Iraq.

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21. In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Court stated that judicial review is inappropriate where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."


24. See Age v. Bush, 752 F. Supp. 509 (D.D.C. 1990) (deployment of military forces to the Persian Gulf under President George H.W. Bush presents a political question); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (challenge to Persian Gulf deployment dismissed on standing grounds). In the case directly involving the masculinist nature of military service, the Congress had decided not to include women in the 1980 draft registration, even though such registration had been supported by the military. The Court ruled that the case presented a non-justiciable political question. *Rostker v. Goldberg*, 453 U.S. 57 (1981). For a full analysis of that case, see Scales, *supra* note 6, at 38-40.

25. To date, there have been only two cases challenging the constitutionality of the 2003 invasion of Iraq. The federal district court in Massachusetts dismissed the action on political
The preemptive nature of the Iraq War, in contrast to the Vietnam War, poses a more profound question for the future. Vietnam raised the classic question of whether the Executive was acting on its own, and therefore unlawfully, or whether Congress had authorized military action under its war powers. The Iraq War, on the other hand, presents the question—not yet presented to any American court—of whether there is any power anywhere in the Constitution for any branch of government to declare preemptive war. That is, even if Congress did purport to authorize the Iraqi invasion, could it? Does the Legislative branch (or the Legislative and Executive branches acting together) have the power to authorize an unprovoked deployment of troops for the purpose of invading another country? I believe not, or at least believe there are excellent constitutional arguments to the contrary. If we stick with our present-cultivated judicial ignorance, however, the political question doctrine will ensure that no United States court ever hears those arguments. This is true even where it may be demonstrated—or at least argued—that the military action was preemptive of nothing more than unproven and vague allegations.

If preemptive war goes unchallenged and unchallengeable, we are left with a recipe for near-certain disaster: the continuing worldwide proliferation of military armaments, the "unappeased demons of national, ethnic, religious, and class fury," and the disproportionate and unwise United States response to those realities. We could do something about the last element; instead, by arguing the international lawfulness and logic of preemptive war, we have ensured that other countries will imitate the argument to justify other acts of aggression. This usurpation of the logic of politics by the logic of war—this syndrome by which power becomes its own end—is the "recurring tragedy of republics."
BEYOND SEPARATION OF POWERS

Less obvious, but more interesting to me, are the constitutional questions where militarism shapes the debate—perhaps even unconsciously—but is not acknowledged or understood as having played that role. Take, for example, Roe v. Wade, the 1973 abortion case. You will recall that Justice Blackmun grounded the whole opinion in what “history reveals about man’s attitudes toward the abortion procedure over the centuries.” Critical to his strategy was the fact that restrictive abortion laws were “of relatively recent vintage.” Blackmun noted that it was not until after the Civil War that most states enacted criminal abortion legislation. He then described how it was not until the 1950’s that states had made the offense more serious. Yet Justice Blackmun leaves the wires unconnected: restrictions on reproduction in the United States seem to coincide with the need for cannon fodder. Indeed, there is a strong correlation—trans-historically and trans-culturally—between the needs of war and the legally-sanctioned appropriation of women’s bodies.

A more recent, but equally important, example of how militarism shapes constitutional jurisprudence in unspoken ways is the 2001 case of Nguyen v. Immigration and Naturalization Service. That case upheld one of the last facially discriminatory sections of the United States Code. The statute at issue treated children born abroad of unmarried female U.S. citizens more favorably than children born abroad of unmarried male U.S. citizens. Whereas the child of the female citizen is automatically a citizen, the child of a male citizen is not. Instead, that child’s father has to satisfy several statutory criteria before

32. Id. at 117.
33. Id. at 129.
34. Id. at 139.
35. Id.
36. But see Nina Totenberg, Justice Harry Blackmun’s Papers: Documents, Oral History Reveal Supreme Court’s Inner Working, NPR, (Mar. 4-8, 2004) at http://www.npr.org/news/specials/blackmun/ (preliminary review indicates, unsurprisingly, that Justice Blackmun was closely concerned with the razor-thin majority support for Roe).
37. In an abortion funding case, a majority of the Court (excluding Blackmun) seemed to speak indirectly of the connection between reproductive control and military need. Maher v. Roe, 432 U.S. 464, 479 n.11 (1977) (upholding state restriction on use of public funds for non-therapeutic abortion):

In addition to the direct interest in protecting the fetus, a State may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth.

Preventing access to abortion would seem to increase population, so restrictions would not seem to serve any state interest related to over-population. One wonders what demographic concerns a government could have in preventing abortion, other than eugenics or increasing the number of potential soldiers.
39. See id. at 58-59.
41. Id. § 1409(c), (a)(4).
the child turns eighteen in order for the child to become a U.S. citizen.\textsuperscript{42}

The facts of the case are important. Mr. Nguyen was born in Saigon in 1969 to an unmarried U.S. businessman, Joseph Boulais.\textsuperscript{43} Nguyen never knew his mother, and at the age of six, he came to the United States with his father.\textsuperscript{44} Mr. Boulais did not jump through the necessary citizenship hoops before Mr. Nguyen turned eighteen.\textsuperscript{45} At the age of twenty-two, Nguyen pled guilty to two counts of sexual assault on a child.\textsuperscript{46} Because his father had never sought to secure citizenship for him, Mr. Nguyen was found to be deportable.\textsuperscript{47}

The U.S. Supreme Court held in a 5-4 decision that the differential citizenship statute satisfied the "intermediate standard" of constitutional scrutiny that applies in sex discrimination matters.\textsuperscript{48} Congress justifiably wanted to assure a real connection between parent and child. Fathers and mothers are not similarly situated with regard to proof of biological parenthood.\textsuperscript{49} Assuming that a reliable witness was watching, I suppose, the government could feel certain that a particular baby came out of a particular woman.

Justice O’Connor led the dissenters, and we all enjoyed seeing her finally get angry with her brethren in a sex discrimination case. Several commentators agree with O’Connor that the majority abused the intermediate standard of review,\textsuperscript{50} and rightly complain that the Court blew a virtually costless opportunity to bolster an example of responsible fatherhood.\textsuperscript{51} Still other commentators unpack the aspects of racism that construct the situations of

\begin{itemize}
  \item \textsuperscript{42} Id. §1409(a).
  \item \textsuperscript{43} Nguyen, 533 U.S. at 57.
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id. at 53.
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} Id. at 57.
  \item \textsuperscript{48} Id. at 60-61.
  \item \textsuperscript{49} Id. at 63.
  \item \textsuperscript{51} Nguyen was the consolidation of an earlier plurality position. See Miller v. Albright, 523 U.S. 420 (1998). In my view, the best of the articles to date about this problem is: Kristin Collins, \textit{When Fathers’ Rights Are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright}, 109 YALE L. J. 1669 (2000). See also Laura Weinreb, Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in \textit{Nguyen v. INS}, 12 COLUM. J. GENDER & L. 222 (2003); Marie Cocco, \textit{High Court Flunks on Fatherhood}, TIMES UNION, June 22, 2001, at A13; Editorial, \textit{Discriminating Against Dads: Foreign-Born Children of U.S. Fathers Deserve the Same Treatment as Foreign-Born Children of U.S. Mothers}, THE OREGONIAN, June 14, 2001, at D8. In an op-ed piece also taking the Court to task for encouraging irresponsible fatherhood, Professor Catharine MacKinnon referred to the military context: “The majority opinion recognized that American military men, especially, roam the world making babies with women abroad – babies for whom the United States then takes no responsibility unless their fathers opt to claim them early.” Catharine MacKinnon, \textit{Can Fatherhood Be Optional?}, N.Y. TIMES, June 17, 2001, at A15.
\end{itemize}
children like Nguyen.\textsuperscript{52}

These analyses are great as far as they go, but do not in my view focus sufficiently on the role of militarism in the case. Two members of the Court had mentioned in passing that military service might have some connection to the problem Congress was attempting to address.\textsuperscript{53} Were they, like Blackmun in \textit{Roe}, just not clocking the significance of the military connections, or were they just not mentioning the unmentionable? The spoils of war have always included the ability—though now nominally prohibited—to rape, prostitute, kill, or otherwise possess and then abandon the women belonging to the enemy.\textsuperscript{54} This is how the enemy is broken. Thus are the soldiers, in part, compensated. To grant automatic citizenship to their children, thereby subjecting each and every soldier-father to the possibility of paternity suits, child support payments, and the like, might deprive combat of some of its appeal. It would miss the existential and deeply gendered point of mayhem.\textsuperscript{55}

\textit{Nguyen} was a great opportunity to reinforce the ideology of militarism precisely because militarism didn't have to be acknowledged. It helped that the facts of the case were atypical. Mr. Boulais was not a serviceman; the mother had not been abandoned in a foreign country by a soldier. The father had voluntarily brought the son to the United States and raised him here. The son was being deported for sex crimes. In the more typical cases, however, the \textit{Nguyen} opinion abandoned millions of women and children throughout the world, throughout the wars, to the vicissitudes of military abuse.


\textsuperscript{53} Justice Kennedy speaks for the majority of the possibility that a male parent could be unaware of a child's birth, and stated that “[o]ne concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.” \textit{Nguyen}, 533 U.S. at 65. In dissent, Justice O'Connor stated that the majority's recitation of military and foreign travel statistics “may itself simply reflect the stereotype of male irresponsibility that is no more a basis for the validity of the classification than are the stereotypes about the 'traditional' behavior patterns of women.” \textit{Id.} at 94.

\textsuperscript{54} See Emily Nyen Chang, \textit{Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry}, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 621 (2001). In the gender-integrated U.S. armed forces, the problem of sex-abuse is also internally widespread. The \textit{Denver Post} published a comprehensive series about the abuse of spouses and of women in the service:

As many as 200,000 women have been sexually assaulted while serving in the armed forces. Over the past decade, nearly 5,000 accused Army sex offenders have avoided prosecution. More than 10,000 cases of spouse abuse were substantiated annually between 1997 and 2001. In 2000, 12,068 cases of spouse abuse were reported; only 26 led to courts-martial.


CRIMINAL LAW

Jamie Lee Curtis: Have you ever killed anyone?
Arnold Schwarzenegger: Yeah, but they were all bad.

— True Lies

On the criminal law front, I just want to discuss two words: preemptive war. This doctrine was announced as the official policy of the United States in a document released with little fanfare by the White House in September of 2002. The President’s National Security Advisor later stated that there were historical precedents for the notion of preemptive war. Yet the examples she cited—President Kennedy’s performance during the 1962 Cuban missile crisis and President Clinton’s handling of the North Korean nuclear crisis in 1994—were inapposite. In the latter, while there were questions regarding the extent of executive power to enter into a nuclear power agreement with North Korea in exchange for disarmament, there was no military deployment. In the former, President Kennedy never attempted to justify the naval blockade as preemptive self-defense, but rather as a response to a call to action from the Organization of American States. Moreover, in deploying the navy to blockade Cuba, Kennedy expressly rejected the use of an invasion force. He was acting consistently with the self-defensive principle of least violent means.

The Bush preemptive war doctrine is an entirely different concept. As one former National Security official put it, “there is a qualitative difference between

56. TRUE LIES (Twentieth Century Fox 1994).

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. Id.

59. There is another episode in U.S. history often cited for the notion that there is a legitimate notion of preemptive war, or preventive self-defense, in international law. In it, the United States was very much on the other side of the debate. The British in 1837 destroyed the U.S. steamer Caroline on the grounds that it was being used by American sympathizers of a Canadian rebellion. Britain was not at war with the U.S.; it was acting preemptively to thwart a threat from elsewhere. The U.S. responded hotly that self-defense could never be invoked unless the threat was “instant, overwhelming, leaving no choice of means, and no moment for deliberation.” Letter from Secretary of State Daniel Webster to (his counterpart) Lord Ashburton, August 6, 1842, quoted in Miriam Sapiro, Iraq: The Shifting Sands of Preemptive Self-Defense, 97 AM. J. INT’L L. 599, 600 (2003).
quietly considering the option of preventive action in a particular case, and publicly embracing it as a doctrine potentially applicable to all adversaries." 60

Though there is not an exact correspondence, international law describing the circumstances that justify a nation's self-defense is closely akin to self-defense in the criminal law. If anything, because the consequences of overreaction are so much more grave in the international context, international law prescribes greater caution and self-restraint than is required in criminal self-defense law. The official policy of the United States, however, incorporates none of the restraining principles of self-defense: imminence, necessity, or proportionality. 61 As applied, it represents official embrace of a notion that I thought anathema to the democratic ethic, that the ends justify the means. After all the evidence was in, all that could be said was that the U.S. invaded Iraq because President Saddam Hussein was a bad man.

I think those who batter women are bad. 62 I think those who have ever done it, or harbor those who have ever done it, or who might ever potentially do it, represent a threat to the well-being of what could ever be meant by "civilization." There are some days when I am so angry about the epidemic of violence against my sisters that I wonder how we could take these guys out before they do what they do. But then my lawyer self kicks in: those accused of violence are entitled to due process, those who might commit violence in the future cannot be targeted in a democracy, and if "the rule of law" means anything, it must aim primarily to constrain instances of socially-sanctioned violence.

At least theoretically, the goal of discouraging violence is the reason that so much attention has been given to the cases where battered women have killed their batterers. It is vastly disproportionate attention. Professor Kim Kinports, a pioneer in the scholarship of domestic violence, points out that since 1992, there have been six times more law review articles about battered women killing in self-defense than there have been reported cases on that topic. 63

The primary focus of this attention is the case of the "non-confrontational killing"—where a woman struck back before or after a beating or when her attacker was otherwise occupied or even asleep. Prominent in the discussion is how the female defendant in these circumstances may not meet the customary elements required of self-defense. It is argued that her apprehension of violence was not reasonable within the meaning of conventional self-defense doctrine. 64

60.  Id. at 599 n.4 (emphasis added).
62.  I feel justified in using gendered nouns in this discussion, because in my opinion domestic battering is a specific version of gendered violence, and because 85% of reported incidents are perpetrated by men.  Callie Marie Rennison & Sarah Welchans, U.S. Department of Justice, Intimate Partner Violence 1 (2000).
64.  See, e.g., Stephen J. Morse, Excusing and the New Excuse Defenses: A Legal and Conceptual
and particularly, that the violence she anticipated was not "imminent." I do not intend to rehearse those arguments or the controversies about governmental responses to domestic violence. I simply mean to emphasize that all of our hard work on the topic is thoroughly contextual. It proceeds from observations about differential social power, particularly when analyzing the desperation and optionlessness of a woman living in a violent relationship. All of the research and analysis works to inform the legal requirement that self-protective violence be necessary under all the circumstances.

Under the doctrine of preemptive war, it appears that the perpetrator of violence does not need optionlessness or reasonableness or imminence or proportionality to justify its actions. I am drawn to the conclusion of one researcher that, in the final analysis, battered women have trouble selling self-defense because their cases "are not seen as 'real fights.'" Even when classically confrontational, when a woman has a knife at her throat, her response is just not part of the official-Clint-Eastwood story of violent engagement. Conversely, playing soldier (or playing commander-in-chief with real soldiers; over 1,100 American soldiers dead in Iraq to date) is the big box office version of that story. It is not simply that a double standard is at work, or that multiple standards are at work in this equation. Surely, we are used to dealing with such situations. It is rather that the standard itself has been vaporized.

TORTS

Again, if there are two words that encapsulate the militarization of a field of law for the area of torts, those two words are "Agent Orange." There is a one-two militaristic punch delivered by Agent Orange, which itself came from a military context. During the Vietnam War, the United States military used tons of that chemical compound (the active ingredient of which was dioxin) to defoliate the countryside. Military personnel suffered a wide range of diseases and disabilities, from skin diseases to various cancers to birth defects among their offspring. The Veterans Administration (VA) proceeded incrementally, at an excruciatingly slow pace, and only under court order, to include these diseases one-by-one within the otherwise limited health coverage provided to veterans.

The rub comes with respect to other legal options available to veterans in their time of need, before the VA acted, and beyond the health care coverage that the VA provides. At one point, Vietnam veterans brought products liability suits against the manufacturers of Agent Orange, all of which were consolidated in the early 1980's in the Eastern District of New York, presided over by Judge Jack B.

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Weinstein. In a complex and dramatic litigation, Weinstein engineered a settlement pursuant to which the manufacturers paid $180 million into a trust fund for the veterans who were members of the plaintiff class. However, Judge Weinstein granted summary judgment in favor of the manufacturers against the veteran plaintiffs who had opted-out of the class. The primary ground was that the plaintiffs could not possibly prove causation.

The first punch was this. In non-suiting the opt-out plaintiffs, Judge Weinstein created a regime of cause-in-fact proof that has had devastating effects for plaintiffs in almost all toxic tort litigation involving non-signature-disease harms. In any situation where a plaintiff’s harm could have been caused by something other than defendant’s product, a plaintiff, in essence, must produce epidemiological evidence indicating that the toxin in question more than doubled their initial risk of contracting the disease. Without regressing into a long explanation of what is amply explained elsewhere, suffice it to say that Judge Weinstein began an era of “‘strict scrutiny’ of [scientific evidence] by non-scientifically trained judges.”

Why would Judge Weinstein, who approved the settlement, have turned around and thrown out the other plaintiffs? Investigation into the long story of that litigation reveals that the matter was by no means an evidentiary slam dunk for the defendants. Judge Weinstein went out of his way to hang the whole case on epidemiological evidence, a move that was deeply suspect. I believe Judge Weinstein’s real motives in this instance were both practical and ideological. He certainly wanted to avoid the extraordinary burden that the Agent Orange trials would have placed on the courts. This answer, however, is not entirely satisfactory. Courts undertake burdensome trials on a regular, if reluctant, basis. More importantly—and perhaps not fully consciously—I surmise that Judge Weinstein was unwilling to have the morality debate over Vietnam fully unfold in his courtroom.


69. The proof pattern invented by Judge Weinstein was picked up and institutionalized in the litigation over Bendectin, the medication prescribed to pregnant women for morning sickness that was alleged to cause birth defects. See Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 Nw. U. L. Rev. 643, 670 (1992) (presenting an engaging account of Judge Weinstein’s influence in this regard).


72. In the many published district court opinions from the Agent Orange litigation, Judge Weinstein often notes the great burdens on the court as well as the political and emotional difficulties of the case. For example:
The second punch to land was the Second Circuit affirmance of the dismissal of the veterans’ claims. The Second Circuit did so, not on causal grounds, but on grounds of the “military contractor defense.” That defense, “evoking the unique imperatives of decision making in wartime,” makes it virtually impossible for persons injured by the negligence of defense contractors to successfully litigate claims, even when the actions or products of those contractors clearly caused the plaintiffs’ injuries.

The immunity given for harms caused by militarized enterprises is quite broad. Since 1950, members of the armed forces have been precluded from recovering from the United States for injuries incident to their service, even when those injuries are negligently inflicted. Going well beyond that, in 1988 the United States Supreme Court recognized the “military contractor defense.” Pursuant to this doctrine, a defense contractor can escape tort liability even in cases where the contractor was performing according to government specifications, even where the contractor negligently participated in producing those specifications. It is only with this protection, the reasoning goes, that the military can encourage innovation and participation in defense industries. That rationale notwithstanding, the majority of circuits that have considered the issue have held that the government contract defense extends to non-military as well as military contracts. In the Homeland Security Act of 2002, Congress imposed a rebuttable presumption that the military contractor defense applies in claims against suppliers of anti-terrorism technologies, and otherwise limits the liability of such contractors.

Here we see juggernauts converge. At the same time that executive power

Vietnam veterans and their families desperately want this suit to demonstrate how they have been mistreated by the country they love… The court has been deeply moved by its contact with members of the plaintiffs’ class from all over the nation and abroad… But no single litigation can lift all of plaintiffs’ burdens. The legislative and executive branches of government—state and federal—and the Veterans Administration, as well as our many private and quasi-public media and social agencies, are far more capable than this court of shaping the larger remedies and emotional compensation plaintiffs seek.

In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 747 (E.D. N.Y. 1984). See also SCHUCK, supra note 71, at 255 (“[t]o many of the veterans… the case was a morality play performed on a stage”), id. at 257 (the case was “the final inquest into our conduct of the Vietnam War”).


74. SCHUCK, supra note 71, at 308.


79. Id. §442-43.
over all matters military has been cementing, "tort reform" has reached a frenzied level. Who can doubt that it would be more "efficient" for industry if the universal rule were that a plaintiff can never prevail? I recall a New Yorker cartoon depicting a corporate board, each member with hand raised, and the caption was, "all in favor of a cap on our liability?" It must be nice.

The progress here is paradigmatic of the logic of war. The preclusion of suit by armed forces members under the *Feres* doctrine was based on a nexus with demonstrated military need. Since Rehnquist became Chief Justice, the focus has been not on needs of the military, but on the fact of a matter simply *being military in nature*. This has been part of the Rehnquist Court's emphasis on the military constituting a "separate society," nominally under civilian control but in essence simply beyond the ken of civilian understanding. When such cases come before courts in the Rehnquist era, the military (or those speaking as the military) probably couldn't explain a nexus between any action at issue and genuine military necessity, but they will not be asked to.

The next step in the logic is for the separate sphere of the military to engulf all other spheres. I believe that has been happening for a long time, but there can be little argument that it has been happening at least since September 11, 2001. The boundary between war front and home front has been blurred, if not yet wholly obliterated. Thus, 'tort reform,' though it presently has many manifestations that appear local, will slowly but surely take on the imperative of national security. All systematic eviscerations of laws that protect consumers and workers from capitalist power (such as civil suits against corporate tortfeasors) will take on the imperative of national security.

**COMMERCIAL LAW**

What I learned in law school was that the rules of commercial exchange were devised in order to promote predictability and uniformity for everyone - uniform rules are supposedly about contractual freedom and maximum productivity. It turns out, however, that there are two different economies, the

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82. See id. at 734-54 (arguing that under Chief Justice Rehnquist, the Supreme Court has increasingly deferred to military claims of necessity without assessing the validity of those claims).
83. See Paul W. Kahn, *Nuclear Weapons and the Rule of Law*, 31 N.Y.U. J. INT'L. L. & POL. 349, 351 (1999) (describing how "modern warfare has been in a chronic state of illegality" particularly regarding the blurring of formerly important lines such as "combatant" versus "non-combatant").
84. See *Hamdi*, 124 S. Ct. at 2635, which is the most hopeful indication in the post-September 11th era that courts will not let militarized executive power pervade every aspect of citizenship. The result there was modest - simply to require an opportunity for a U.S. citizen detainee to challenge his detention. There is a long way to go in staunching the flow of militaristic power.
85. See WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 270-340 (1973)
civilian economy and the military economy. The rules are not only different for the two economies, but the former is regularly looted in order to protect the latter.

For investors who missed out on the dot-com bubble or the privatization of prisons, defense industries are a better route than ever.\(^b\) The Pentagon itself is broke. In the invasion of Iraq, the Pentagon falls short by one billion dollars a month in providing for troops, equipment, spare parts, and training.\(^c\) Nonetheless, the Pentagon plans to spend $144 billion in the next year alone for research and development of weapons for future wars.\(^d\) President Bush is attempting to make up the difference from the taxpayers,\(^e\) which will surely be at the expense of social programs. Senior citizens can’t buy life-saving drugs, but “Star Wars” is alive and well.\(^f\) Most alarmingly, billions of those dollars will go into development of new nuclear weapons,\(^g\) which, according to the Bush doctrine, the United States will be entitled to use just on a hunch of threat to national security.

Much of the militarized economy is devoted to the sale of arms to other countries, both by the government and by private firms and individuals. The regulatory regime is concerned primarily with sales of “weapons of mass destruction” or technologies connected with them. I loathe the term “weapons of mass destruction,” as if the small arms trade is insignificant,\(^h\) or as if three other


\(^{87}\) Tim Weiner, Pentagon groans for cash as military spending increases; Boom times for contractors don’t translate to fighting war, INT’L HERALD TRIB., Sept. 30, 2004 at 13.

\(^{88}\) Id.


\(^{90}\) President Reagan first proposed an ambitious plan to intercept nuclear missiles in space, a plan called the Strategic Defense Initiative, that was quickly dubbed “Star Wars.” There is intense ongoing debate about space-based defense strategies. Theresa Hitchens, National Space Policy: Evolution by Stealth?, ARMS CONTROL TODAY 19, Nov. 1, 2004 (describing Pentagon advocacy of space control as having reached a “fever pitch”). In violation of my own policy of limiting research for this piece to pre-election events, I feel compelled to report that in December of 2004, the fledging missile defense shield failed a test launch.


\(^{92}\) On the magnitude of the international trade in small arms, see Lora Lumpe, Taking Aim at the Global Gun Trade, AMNESTY MAG., Winter 2003, at 10, 12 (“any transfer of firearms that Washington approves is legal – no matter how egregious the human rights record of the recipient”).
major U.S. exports—racism, sexism, and poverty—were not themselves the most effective weapons of mass destruction ever devised. But these last items cross borders without acts of Congress. Large-scale military armaments are controlled by the Arms Export Control Act, 93 pursuant to which the Congress and the Secretary of State get to decide who is on our list of friends and when they become enemies.94

On a smaller but telling scale, I’d mention another, less obvious, example of the distortion of commercial law by militarism: the privatization of the armed services.95 Remember that military contractors are often immune from suit.96 Until the Halliburton scandal, the public was not generally aware that the military “outsources” fundamental features of the defense mission, from housing and feeding of service people, to intelligence gathering, to providing security for the service people who are themselves securing the rest of the world.97

A fascinating postmodern example of war profiteering is “commercial sponsorship” of military activities. The service branches, and even specific outfits or forts within each branch, actively compete for commercial sponsorship. Some of the sponsorship websites originally constructed by military units have now been taken down. On an earlier Army website, potential investors were met with a picture of a group of vigorous soldiers next to the caption: YOUR MISSION: CAPTURE THEIR BUYING POWER. YOUR STRATEGY: BE ALL YOU CAN BE WITH ARMY SPONSORSHIP."98 The Air Force sponsorship website opens like this: “Don’t let this opportunity fly by! Your sponsorship opportunities are limitless—call us with your ideas and we will customize a package to meet your specific needs. Put Some FORCE Behind Your Next Promotion.”99

94. For example, countries designated by the Secretary of State to have “repeatedly provided support for acts of international terrorism" are not eligible to receive export arms, financing for same, or funding for their own arms programs. 22 U.S.C. §2780(d). The nations presently on that list are Cuba, Iran, Libya, North Korea, Sudan, and Syria. 22 C.F.R. § 126.11(d) (2004). As we were reminded by Saddam Hussein, having someone on the friends list is a temporary and dangerous enterprise. Yet the U.S. still arms countries that nourish a wide range of perils. See Joshua Kuriantzick, Off Guard: Stop Arming Southeast Asia, NEW REPUBLIC, Jan. 20, 2003, at 16.
97. This and other sponsorship websites, apparently no longer available, are described in Major John Siemietkowski, To Infinity and Beyond: Expansion of the Army’s Commercial Sponsorship Program, 2000 SEP. ARMY LAW, 24, 27 (2000) (emphasis in original).
98. HQ Air Force Service Agency Sponsorship Program, Public Sponsorship, at http://www-
The site goes on to delineate the ways that corporations can profit from dealing through the government to the servicepersons' "market."\(^{100}\) When I first visited the site on March 4, 2004, it listed "logos on uniforms" as an example of corporate sponsorship. A question in my mind then has since been answered. The site now restricts that benefit to "logos on sports uniforms."\(^{101}\) I suppose some potential corporate sponsor had the same question, and who can blame them for thinking that the Air Force might really sell space on combat uniforms? Military personnel already attend "Miller Time" entertainment events. The higher-ups regard this as a crucial part of morale building, and morale is a half of the struggle (of which funding is the other half). The military couldn't go on without corporate sponsorship, given that morale budgets have been slashed at a time when recruiting for the all-volunteer military is at an all-time low.\(^{102}\) We long ago had to get used to sports events being renamed for corporate sponsors, such as the Southwestern Bell Cotton Bowl and the FedEx Orange Bowl. I would not be surprised to witness the introduction of the Phillip Morris Bill of Rights and the Department of Defense website swimsuit issue. The Ronald McDonald Air Force would have been an advertising coup.

There is so much going on in the sponsorship matter. The captive audiences and advertising monopolies for the corporations are the tip of the iceberg. More fundamental to my analysis is the frank identification of the Armed Forces with consumerism. The U.S. branches are not only in competition with forces from other countries; they are also in competition with each other to see which can buy the most on their meager salaries. Given how unnecessary war almost always is, this could be the ultimate reason to maintain the standing military, or at least the domestic side of the international arms trade.

**SO WHY ARE WE SOFT ON DEFENSE?**

I hope that I have demonstrated the influence of militarism, at least in my own line of work. I'm sure that readers can come up with other manifestations of militarism in the law school curriculum. It may be useful to speculate about why we don't make more of it, especially in the examination of the intersection of women and war. I think there are at least four interrelated reasons.

First, I remain convinced that militarism is gendered to the ground. As I reported in my first article on this topic in 1989, at least one Marine believes that "[w]hen you get right down to it, you've got to protect the manliness of war."\(^{103}\)

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\(^{100}\) Id.

\(^{101}\) Id.

\(^{102}\) Siemietkowski, *supra* note 98, at 24-25.

\(^{103}\) Id.; U.S. Marine quoted in Cynthia Enloe, *Does Khaki Become You? The Militarization of Women's Lives* 154 (1983). Professor Enloe's was among the first in the present wave of analyses of masculinity and war; I wrote the first, to my knowledge, in a law review. Scales, *supra* note 7. For other useful treatments of the theme of genderized, militarized violence, see generally Susan Jeffords, *The Remasculinization of America: Gender*
I hope it goes without saying that, in agreeing with that statement, I am not male-bashing. I do not believe that males are warlike and females are peaceful. I do believe, however, that the social construction of masculinity and femininity are the underpinnings of a symbiotic system of socially sanctioned aggression that makes anyone able to tolerate war as an answer to any problem. I am surely not the only person who believes so, and am glad to see more scholarship being devoted to the connections between gender and war. If we’re not confronting that connection, we’re feeding the beast.

I suspect I’m not the only person who was made both anxious and depressed by the contours of the 2004 Presidential contest. Senator Kerry and President Bush went on a masculinity bender, letting the campaign be a giant arm wrestle about who would be the manliest commander-in-chief. The President’s posture was expressly about the masculine virtues of aggression, instinctively certain volition, and control (as opposed to peacemaking, deliberation, and accommodation). Think of the President’s dramatic appearance on May 1, 2003 aboard the USS Abraham Lincoln. Mr. Bush arrived in the copilot’s seat of a Navy fighter jet after making two fly-bys of the carrier. The President emerged wearing a “Top Gun” suit. Later he stood in front of a (mysteriously placed) “Mission Accomplished” banner and proclaimed that major combat operations in Iraq were over. I cannot imagine witnessing this performance and thinking anything other than, “what a man” or a less


104. See Kathleen Kennedy, Manhood and Subversion During World War I: The Cases of Eugene Debs and Alexander Berkman, 82 N.C. L. REV. 1661, 1662 (2004) (“Since the early 1980’s American citizenship has undergone a remasculinization that rehabilitates the citizen-soldier as the quintessential symbol of American values and protector of American freedoms. . . [B]oth policy and cultural images increasingly regenerate militarized manhood, linking it to a violent, aggressive, and often misogynist defense of the nation and the heterosexual family. . . against an irrational, repressive, wantonly violent, and uniquely pernicious enemy—the Muslim male terrorist.”).

opprobrious equivalent.

Senator Kerry, other than showcasing his own military service as a primary qualification for office, was less blatantly masculine. He relied, however, on courage, sacrifice, principled action, and transcendence — what are historically understood in U.S. political discourse as manly virtues, if not always or only understood in opposition to feminine virtues.

Legal institutions in the United States have not quite gotten a grip on the problem of gendered violence. In the cases of the Virginia Military Institute and the Citadel, for example, the problem is less the lack of female entry to gendered institutions, but the gendered nature of the institutions themselves. Thus, I believe our friend Justice Ginsburg’s opinion in United States v. Virginia quite missed the point. Our girls with shaved heads shouldn’t have been admitted to the institutions; the institutions should have been shut down. Professor Valerie Vojdik, a participant in the March 2004 conference and counsel for Shannon Faulkner in the Citadel case, has as much insight as anyone about the self-defeating nature of winning the military school cases.

It is still academically unpopular to talk about gender qua gender in any context. I hope this fashion is passing, because it is extraordinarily difficult to talk about militarism without taking all the institutions of gender into account. That is, while we academics are busy problematizing and de-stabilizing gender (at least in our own minds), militarism — above all other institutions in my estimation — is busy reinforcing gender, in its worst non-fluid forms. Militarism is the most powerful essentializing force in the world.

Second, on a deeper level, I believe this is a struggle among feminists for a reliable concept of autonomy. Particularly in the United States, if one wants to have political persuasive power, one has to adhere to the concept of realpolitik. One has to conform with what is called “realism” at least in external expression; even better if one believes it. One must allow that the rule of law doesn’t really apply when it comes to matters of national security, which really means a wink

106. See Kennedy, supra note 104, at 1690-93. Reading this account of the masculinity contest between prosecutor and defendant in the 1918 sedition trial of Eugene V. Debs was eerily reminiscent of the 2004 Presidential debates.

107. Id. at 1674, n.64 (noting Gail Bederman’s distinction between manliness, a nineteenth century value identifying moral virtues that men should have, and masculinity, a fluid concept that distinguishes men from non-men and women).


111. A recent article describes a recurring narrative about the intrinsic capabilities of the executive branch, relying for textual support on the Vesting Clause, which states that “[t]he executive Power shall be vested in a PRESIDENT of the United States of America,” U.S. CONST. art. I, §1, cl. 1, as if that somehow said it all. See generally Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 MICH. L. REV. 545 (2004).
and nod to global capitalism and the global arms trade. One must embrace the
militaristic mandate to promote the objectification of the enemy, so we feel okay
about killing them. It is the same seduction of realpolitik that underlies most
efforts—feminist and otherwise—to oppose prostitution and pornography. A
lot of people seem really to believe that war, the poor, and the systematic
consumption of women are simply “always with us.” I cannot believe in that
view or let it disempower me. When we fall for that version of self, for that
version of authority, we are grasped in the falsely-patriotic talons of a depressing
post-Cartesian axiom: “I objectify, therefore I am.”

Third, maybe we had a chance to confront militarism, but it just isn’t safe
anymore. With the enactment particularly of the Patriot Act, the United States is
a scarier and scarier place for citizens and non-citizens alike. The Wall Street
Journal, that radical anti-militarist rag, reported just three days before the March
2004 conference that an Army intelligence officer has demanded a videotape of
another conference at the University of Texas School of Law.112 The conference
was entitled, “Islam and the Law: The Question of Sexism?”113 Apparently,
“Middle Eastern men... made ‘suspicious’ remarks to Army lawyers at the
seminar.” Though I’d love to find out what was so suspicious, I probably never
will, due to the cult of secrecy. If the military has demanded a videotape of the
Boalt conference, I haven’t heard about it. Maybe the Army ignored it because it
was a chick conference. Maybe it was more important not to acknowledge that
there was any connection between women and war. That would be the
proverbial can of worms. It is critical to genderization that chick stuff be
designated as such and denigrated accordingly.

Fourth, relatedly but far more broadly, perhaps no one wants to face
militarism because it is the single most important indication that Thomas Hobbes
was right. You remember poor old Hobbes. He was one of the most influential
social contract theorists, a philosophical founding father of the American
voice and fear.114 Hobbes believed that our
species is inherently, permanently, and lethally aggressive. Thus, we all live in a
state of chronic anxiety, expecting violent death at any moment.

We form governments to protect us from insecurity, but inter-governmental
warfare is a big source of that insecurity. Governments wage war, at least they
say, to protect us from our inherent insecurity. Hobbes saw the irrational and
suicidal vicious cycle in this. It is this tendency toward war-making that, more
than anything else, led Hobbes to his famous conclusion that life is “solitary,

112. Robert Block & Gary Fields, Is Military Creeping Into Domestic Law Enforcement?, WALL


114. John Rogers, Thomas Hobbes, BBC History
poor, nasty, brutish, and short.\textsuperscript{115}a

This may sound familiar to you. Vice President Cheney openly identifies with Hobbes. I could ask you to note that you never see Tom and Dick together in the same room, except that I have a sure-fire way of telling them apart. Hobbes believed that the legitimacy of government followed only from its resistance to waging war except in cases of the \textit{strictist self-defense}. Hobbes, I think, would have been the first to condemn the doctrine of preemptive war as a pretext for the illegitimate consolidation of governmental power.

I'll conclude by telling you about going to the movies just before the conference at Boalt. In the recent award-winning documentary "The Fog of War," former Secretary of Defense Robert McNamara defines the eponymous phrase in terms of the inability of the human mind to comprehend all the variables in warfare. He suggests that war cannot be successfully planned. Staying out of it, or surviving it once in, are matters of sheer dumb luck. I would add that in warfare, luck always runs out for everyone: nations are destroyed, peoples are slaughtered, and whatever transformative ideas they may have had about how to better human life are evaporated or forever negatively distorted.

The organizers of the March 2004 conference asked that we address ourselves to a "non-essentialist feminist critique of war." As noted above, I do not view the association of militarism with the social construction of masculinity and femininity as an essentialist move. To the contrary. It is essentialisms of various sorts that, particularly in combination, get us into so much trouble. Life in the world as a man or as a woman is not formulaic. What I took from "The Fog of War" is that the use of force cannot be formulaic either. Violent response by rote is always a bad idea. Context, purposes, and trying to do better as a species always matter.

What is required of us, therefore, is a radical critique of all of the excuses for and covers for the use of force—that is, a radical critique of militarism—in whatever context it appears. Perhaps the critique is even more important to pursue in situations where the influence of militarism is not immediately obvious. The law can be a small part of that. It will require rigorous mental disarmament, a relinquishment of the luxury of not thinking about militarism in law and a relinquishment of the calcified habit of thinking law can do nothing about militarism. There is enormous untapped potential in mental disarmament. It will take a lot of work to avoid the discouragement that comes from being repeatedly told how ignorant we are.

As former Ambassador to the Soviet Union George Kennan said, there is a naïveté of realism that matches the naïveté of idealism.\textsuperscript{117} The non-naïve approach acknowledges that as a species, we have made monumental mistakes.

\textsuperscript{115} THOMAS HOBBES, LEVIATHAN 100 (Michael Oakeshott ed., Macmillan Publ'g Co. 1967) (1651).
\textsuperscript{116} THE FOG OF WAR (Sony Classics Pictures 2003).
\textsuperscript{117} See SCHELL, supra note 3, at 276.
The non-naïve citizen does whatever it takes to understand security needs. That citizen will not be soft on defense, because she will know that there are versions of security other than those foisted upon us by those who have no vision, no hope, and no sense of restraint.